

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1977

No. 77-1355

Supreme Court, U. S.

FILED

MAR 24 1978

MICHAEL RODAK, JR., CLERK

RUSSELL McNIFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**ROGER JON DIAMOND
15415 Sunset Boulevard
Pacific Palisades, California 90272
(213) 454-1351**

Attorney for Petitioner

RG

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TOPICAL INDEX

	<u>Page</u>
Table of Authorities	iii
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
A. THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN- VOLVING THE METHOD BY WHICH A COURT DETER- MINES THE EXISTENCE OF "GRIFFIN" ERROR, A QUES- TION NOT YET DECIDED BUT WHICH SHOULD BE SETTLED BY THIS COURT.	10

i.

B.	CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE COURT'S POWER OF SUPERVISION.	15
C.	THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW INVOLVING THE STANDARDS FOR DETERMINING THE PROPER LENGTH FOR CLOSING ARGUMENT.	17
	CONCLUSION	20
	APPENDIX NO. 1	
	APPENDIX NO. 2	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Anderson v. Nelson, 390 U.S. 523 (1968)	13
Benham v. United States, 215 F.2d 472 (5th Cir. 1954)	12
Carlin v. United States, 351 F.2d 618 (5th Cir. 1965)	11
Chapman v. California, 368 U.S. 18 (1967)	10, 13
Desmond v. United States, 345 F.2d 225, 14 A.L.R.2d 718 (1st Cir. 1965)	11
Griffin v. California, 380 U.S. 609 (1965)	3, 8, 11, 14, 15
Hayes v. United States, 368 F.2d 814 (9th Cir. 1966)	12
Herring v. New York, 422 U.S. 853 (1975)	17, 18, 19
In re Dellinger, 461 F.2d 839 (7th Cir. 1972)	18
Knowles v. United States, 224 F.2d 168 (10th Cir. 1955)	12

United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969)	14
United States v. Taitano, 442 F.2d 467 (9th Cir.) cert. denied, 404 U.S. 852 (1971)	12
United States v. Williams, 521 F.2d 950 (D. C. Cir., 1975)	12

Constitutions

United States Constitution, Fifth Amendment	4, 9, 20
Sixth Amendment	4, 5, 9, 20

Statutes

18 U.S.C., Section 371	5
Section 1341	5
Section 1342	5
28 U.S.C., 1254(1)	3

Miscellaneous

California Attorneys for Criminal Justice, Forum, Vol. 5, No. 2, p. 8	16
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No. _____

RUSSELL McNIFF,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Russell McNiff, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 18, 1978 affirming the judgment of conviction of the United States District Court for the Central District of California. Petitioner filed a timely petition for rehearing on January 30, 1978 which was denied on February 24, 1978. However, in

denying the rehearing petition the Court of Appeal modified its January 18th Memorandum Order. The Court of Appeal also denied petitioner's motion for an order staying the issuance of the mandate.

OPINIONS BELOW

The United States District Court rendered no decision when it pronounced judgment on March 4, 1977. The Memorandum decision of January 18, 1978 of the United States Court of Appeal for the Ninth Circuit is unreported and is reprinted in Appendix No. 1 to this Petition.* The Order of February 24, 1978, also unreported, which modified the January 18th Memorandum, which denied the Petition for Rehearing, and which denied the motion for an order staying the issuance of the mandate, is reprinted in Appendix No. 2.

JURISDICTION

The judgment of the Court of Appeal was entered January 18, 1978. The order denying a

*

It is reprinted as modified by the Ninth Circuit's order of February 24, 1978.

timely petition for rehearing was entered February 24, 1978. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. In determining whether a prosecutor's closing argument violates Griffin v. California, 380 U.S. 609 (1965) (comment on a defendant's failure to testify), does the appellate court first have to decide whether the argument was, in fact, a comment on the defendant's silence and, if so, whether such comment was harmless beyond a reasonable doubt?
2. Did the Court of Appeal err in not deciding whether the prosecutor's argument constituted a comment on petitioner's failure to testify?
3. Did the Court of Appeal err in failing to distinguish between:
 - a) argument which does not constitute a comment on a defendant's refusal to testify; and
 - b) argument which does constitute such comment, but the comment is harmless,

by merely stating ambiguously,

"The prosecutor's statement to the jury . . . was not so clear a comment on McNiff's failure to testify that it requires reversal."

4. Did the prosecutor violate petitioner's Fifth Amendment privilege against self-incrimination by telling the jury that certain government witnesses were "crooks" but that petitioner was not willing to admit he was a crook?

5. Did the District Court violate petitioner's right to a fair trial under the Fifth Amendment and his rights to a jury trial and effective assistance of counsel under the Sixth Amendment by cutting petitioner's counsel's closing argument by 33-1/3% (from 60 minutes to 40 minutes), in view of the complexity of the trial and the court's admonition to the jury that it is not its custom to permit the jurors to have testimony read to them?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"

The Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On October 20, 1976 petitioner and five other persons were indicted for conspiracy (18 U.S.C. §371), mail fraud (18 U.S.C. §1341), and fraudulent use of fictitious business names (18 U.S.C. §1342). The defendants were generally alleged to have been involved in a scheme wherein companies were billed for office supplies neither ordered nor delivered. Three of the six defendants (Larry Field, Leonard Berk and Paul Sulak) pleaded guilty prior to trial and testified for the Government. One defendant was never apprehended. Petitioner and co-defendant Harvey Weisenthal went on trial on January 18, 1977 after certain counts were dismissed.^{1/}

During the trial the Government called twenty-one witnesses, including the three

^{1/}

The indictment originally contained thirty counts.

co-conspirators who pleaded guilty and one other participant, Douglas Giddings,^{2/} and introduced over thirty-eight exhibits. Two witnesses testified on behalf of petitioner. None testified on behalf of co-defendant Weisenthal. Neither petitioner nor co-defendant Weisenthal testified.

At the conclusion of the evidentiary phase of the trial, petitioner's counsel requested one hour for his closing argument to the jury, but the court allotted him only forty minutes (Tr. 746-747), giving no reason for its time limitation. The court also limited what counsel could argue:

"THE COURT: Well, you won't be given an hour. You will be given 40 minutes. If you do more than talk about the instructions of law in the way that touches upon the jury's obligation not to return a verdict unless they are satisfied beyond a reasonable doubt, then I will have to interrupt you."
(Tr. 747, lines 15-20.)

The time limit significantly restricted the scope of counsel's argument. It took him thirty minutes to discuss general matters. He was left with ten minutes to cover the testimony of the witnesses and conclude (Tr. 811, lines 11-14). Therefore, he could touch only briefly on their testimony, and found it necessary to tell the jury

^{2/} Giddings admitted committing a burglary to obtain business records for the conspirators.

that it could have the court reporter read testimony it could not recall. However, the court interrupted to tell the jury it could not have such testimony read. The court's message was clear although phrased ambiguously:

"Just a minute, counsel. It is not the custom in this courthouse, ladies and gentlemen of the jury, to have the court reporter read testimony. Very exceptionally. Proceed."
(Tr. 811-812.)

Counsel responded with less than ten minutes left for his argument:

"Well, then, you are going to have to recall or use your memory here on the testimony or your notes."
(Tr. 812.)

Counsel was not able, in the short time allotted, to discuss to any significant extent, the testimony of the major witnesses for the prosecution.

The prosecutor, during his rebuttal closing argument, told the jury,

"No question Mr. Giddings is a crook. Mr. Berk, Mr. Field, Mr. Sulak, they are all crooks. They told you that. I am telling you that. The only difference between those people and these two gentlemen [petitioner McNiff and co-defendant Weisenthal]

is that they [Government witnesses Giddings, Berk, Field and Sulak] are willing to admit they are crooks." (Tr. 822, lines 17-21; language in brackets added for clarification.)

This comment of the prosecutor during his rebuttal closing argument prompted petitioner to move for a mistrial^{3/} on the basis of Griffin v. California, 380 U.S. 609 (1965). The court responded,

"I will have to adjourn at this time and consider it. It may be that I will have to grant the motion." (Tr. 832-833.)

The trial court ultimately denied the motion, noting that the prosecutor did not specifically state, "The defendants are not willing to admit their guilt." (Tr. 837-838). The court instructed the jury that a defendant in a criminal case does not have to testify and that "no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify." (Tr. 844-845.)

On May 26, 1977 at 3:30 P. M. the jury retired to deliberate (Tr. 894). At 5:00 P. M. the jury concluded its deliberations for the day; it returned the following morning to resume deliberating. At 3:00 P. M. the jury rendered its verdicts:

Petitioner was found guilty on Counts 1, 2, 3 and 30. Co-defendant Weisenthal was found guilty on Counts 1, 2, 3, 12,

^{3/} Co-defendant Weisenthal also moved for a mistrial.

14, 17, 18, 19, 24, 27, 29 and 30 (Tr. 907-908), all other counts having been dismissed prior to trial.

On March 4, 1977 petitioner was sentenced to fifteen months imprisonment as to Counts 1 and 30, to run concurrently with each other, and five years probation as to Counts 2 and 3, to run concurrently with each other and consecutively to the fifteen months imprisonment. Petitioner immediately filed his notice of appeal and was permitted to remain free on bond. Co-defendant Weisenthal failed to appear for sentencing and is a fugitive. Accordingly, he filed no notice of appeal.

The United States Court of Appeal for the Ninth Circuit devoted one paragraph to petitioner's contention that the court's denial of his request for one hour for closing argument violated his Fifth and Sixth Amendment rights and one sentence to petitioner's contention that the prosecutor's comment regarding petitioner's unwillingness to admit guilt violated his Fifth Amendment privilege against self incrimination. The appellate court affirmed the conviction in an unpublished Memorandum filed January 18, 1978. On February 24, 1978 the court, in response to a timely petition for rehearing, modified slightly the language of its earlier Memorandum, and denied the petition. It also denied a timely motion for an order staying the issuance of the mandate pending the filing of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

- A. THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW INVOLVING THE METHOD BY WHICH A COURT DETERMINES THE EXISTENCE OF "GRIFFIN" ERROR, A QUESTION NOT YET DECIDED BUT WHICH SHOULD BE SETTLED BY THIS COURT.
-

Petitioner contended in the trial court and in the Court of Appeal that the prosecutor's statement in his rebuttal closing argument constituted a comment on petitioner's failure to testify. The trial court apparently concluded that the statement was not a comment on petitioner's failure to testify; therefore, it had no reason to determine whether the "error" was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967). Obviously, if no error was committed there was no need to go further. The Court of Appeal conceded that the comment was "of questionable propriety" but was vague as to whether it constituted a comment on petitioner's failure to testify. Specifically, the Court of Appeal's entire response to petitioner's contention was,

"The prosecutor's statement to the jury, that the only difference between the defendants and the witnesses who testified for the government was that the government's witnesses were willing to admit that they were crooks, while of questionable propriety, was not so clear a comment on McNiff's failure to testify, that it requires reversal. [Citations omitted.]"

The Court of Appeal's ambiguous characterization of the prosecutor's statement apparently fell short of constituting a comment within the holding of Griffin v. California; had the Court of Appeal felt the statement was a comment on petitioner's failure to testify, it would have had to have gone further to determine its impact upon the trial. In its refusal to construe the statement as a comment on petitioner's silence, the Court of Appeal has differed from other circuits which have found indirect comments to constitute Griffin error. See Carlin v. United States, 351 F.2d 618 (5th Cir. 1965) (conviction reversed because of prosecutor's indirect comment) and Desmond v. United States, 345 F.2d 225, 14 A.L.R.3d 718 (1st Cir. 1965).

The Tenth Circuit's test, relied on frequently by other circuits, is whether

". . . the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

Knowles v. United States, 224 F.2d
168, 170 (10th Cir. 1955).^{4/}

The language of the prosecutor in the instant case, which contrasted the willingness of four criminals to admit their guilt with the unwillingness of petitioner, is strikingly similar to the language condemned by the Fifth Circuit in Benham v. United States, 215 F.2d 472, 474 n. 1 (5th Cir. 1954), where the prosecutor told the jury,

"The defendant is seeking, as is not unusual, to lay off his guilt here on women folks - these three women that took the stand - or dead people. He doesn't have the courage to come up before you and say, 'Yes, I did it.'"

The Court of Appeal in the instant case relied upon two prior decisions from the circuit, United States v. Taitano, 442 F.2d 467, 468-69 (9th Cir.), cert. denied, 404 U.S. 852 (1971), and Hayes v. United States, 368 F.2d 814, 816 (9th Cir. 1966). Neither case is apposite. In Taitano no objection was made to the alleged improper remark of the prosecutor until after the guilty verdict; in Hayes the prosecutor's comments were really directed to statements made by the defendant to an FBI agent. Neither

^{4/}

This test was approved by the District of Columbia Circuit in United States v. Williams, 521 F.2d 950 (D.C. Cir. 1975).

case involved the kind of improper remark made herein, a remark clearly designed to refer to the petitioner's silence.

It is obvious that the prosecutor was telling the jury that petitioner did not testify - that he was unwilling to admit guilt. The prosecutor contrasted four government witnesses with petitioner and co-defendant Weisenthal, and pointed out the only difference between them: four were willing to testify and two were not. Obviously, the jury took the statement as it was intended - a comment on petitioner's failure to testify. The district court must have felt the same way, at least initially, because it gave a cautionary instruction and seriously considered granting a mistrial motion. The Court of Appeal said it was "of questionable propriety." The problem is that the courts below have failed to say whether the statement of the prosecutor was a comment on petitioner's failure to testify.

Petitioner submits that a court must make a decision one way or the other. Either it is a comment on silence or it is not. The conclusion that it is such a comment does not necessarily end the matter. Harmless error under Chapman would have to be determined. See, e.g., Anderson v. Nelson, 390 U.S. 523 (1968). But the court must first make the threshold determination. Here, the court below failed to do so. By not ruling clearly on the issue, the Court of Appeal did not proceed further to determine whether the error was harmless beyond a reasonable doubt.

This Court should grant certiorari in order to explain the steps which must be followed in determining "Griffin issues." Hopefully, the Court will hold that the process involves two separate steps: (1) decide whether a comment on silence was made and, if so, (2) whether the comment was harmless beyond a reasonable doubt. Here, the Court of Appeal telescoped the process by ambiguously stating that the statement "was not so clear a comment . . . that it requires reversal." If the Court of Appeal felt it was not a comment on silence it should have so stated. If it felt it was such a comment, the Court of Appeal erred in not determining whether it was harmless beyond a reasonable doubt. This type of fuzzy reasoning should not be permitted.^{5/}

^{5/}
In deciding whether the error is harmless beyond a reasonable doubt, a court may consider the number of comments made. Of course, one may be sufficient. See United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969).

B. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Court of Appeal has almost effectively shielded its decision from review by this Court by failing to articulate the basis of its rejection of petitioner's Griffin contention. The Court of Appeal refused to state whether it considered the prosecutor's statement to constitute a comment on petitioner's silence. Moreover, it failed to state whether, assuming Griffin error, the error was harmless beyond a reasonable doubt.

The Court of Appeal made judicial review even more unlikely by not publishing its decision in order to avoid creating a conflict among the circuits. Litigants, especially defendants facing substantial jail time, are entitled to well thought-out decisions.^{6/}

^{6/}
The unsigned Memorandum of the Court of Appeal indicates the participation of a district judge. Circuit Judge Shirley M. Hufstedler (cont. p. 16)

Petitioner respectfully submits that the manner in which the Court of Appeal handled the appeal requires this Court to exercise its supervisory jurisdiction by granting certiorari and either reviewing the case for the reasons expressed in Part A above and Part C below, or vacating and remanding the case to the Court of Appeal for the purpose of writing a new decision or memorandum.

Petitioner recognizes there is no constitutional right to appellate review; nevertheless, having been granted such right statutorily, petitioner is entitled to a more articulate decision.

6/ (cont. from p. 15)
recently criticized "the extensive use of visiting district judges." California Attorneys for Criminal Justice, Forum, Vol. 5, No. 2, p. 8. It is noteworthy that the Court of Appeal only corrected one of the two obvious errors in its original Memorandum. The other error, while not material, was called to the court's attention in the petition for rehearing, but apparently was forgotten or ignored.

C. THIS CASE PRESENTS AN
IMPORTANT QUESTION OF
CONSTITUTIONAL LAW
INVOLVING THE STANDARDS
FOR DETERMINING THE
PROPER LENGTH FOR
CLOSING ARGUMENT.

This Court recently recognized the fundamental right of a defendant to argue at the conclusion of a criminal case. Herring v. New York, 422 U.S. 853 (1975). In Herring, the trial judge in a non jury trial refused to hear closing argument, and this Court reversed. The instant case is even a stronger case for review by this Court because the instant case was tried before a jury and was tried in a federal court.

In Herring this Court established the fundamental nature of closing argument but did not have the occasion to impose guidelines on trial judges.^{7/} Instead, this Court stated the trial judge "must be and is given great latitude in controlling the duration and limiting the scope of closing summations" and that "he may limit counsel to a reasonable time"

^{7/}
The Court here may rely on its federal supervisory role to set standards for federal trials without "setting" them in constitutional "concrete."

The Court of Appeal misconstrued the nature of this Court's comments in Herring by applying them to the instant case where the time requested, one hour, was reasonable, where petitioner's counsel was courteous throughout the trial, where there was no reason to cut the request by one-third, where the trial was long and complex, and where the trial court all but told the jury it could not have testimony read by the reporter.

In Herring, this Court's comments about the authority of the trial court to limit closing argument were made in the context of its discussion of "repetitive" and "redundant" argument and in light of the Court's concern that argument not "impede the fair and orderly conduct of the trial." Petitioner believes those comments were made to give trial judges the authority to control those attorneys who have participated in courtroom disruptions and generally engaged in contumacious conduct. Cf. In re Dellinger, 461 F.2d 839 (7th Cir. 1972).

Here, however, petitioner's counsel was courteous throughout the trial. He simply needed the hour to argue. Because one-third of his time was cut, he attempted to tell the jury to have the court reporter read testimony he did not have time to discuss if the jury could not recall it but the trial court interceded to tell the jury it was not the custom to permit it.

The fact of the matter is the trial court restricted closing argument because it felt the petitioner was guilty as evidenced by its facetious

comments prior to argument.^{8/} Herring teaches us that the trial judge's belief in the defendant's guilt cannot justify interference with closing argument.

This Court should grant certiorari to define more clearly what it said in Herring about the authority of trial judges to limit the time for closing argument. Obviously there must be some standard to guide the trial court; perhaps the trial court should, for the purpose of facilitating intelligent judicial review, state its reasons for denying counsel's request. Here, the record is silent, except for the trial court's obvious desire to get the trial over quickly and its belief in petitioner's guilt.

There is really very little difference between denying closing argument and substantially limiting the time for closing argument. It is really only a matter of degree. Here, argument was more important than in Herring because of the jury and the complexity of the case.

8/

Prior to closing argument, the trial court asked, "How long are you gentlemen going to discuss the credibility of the Government witnesses?" (TR. 744.) By that, the court admitted that it wanted to know how long defense counsel wanted to argue (Tr. 744, lines 13-15). The court also said, "I'd think maybe you'd want the jury to forget about everything that had been said." (Tr. 744, lines 22-23).

Because of the Fifth and Sixth Amendment rights involved in closing argument^{9/} this Court should grant certiorari to consider the important issues presented.

CONCLUSION

For the reasons expressed herein, this Petition for Writ of Certiorari should be granted and the judgment of the Court of Appeal should be reversed.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Petitioner

^{9/}
Jury trial, due process, and effective assistance of counsel.

APPENDIX No. 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA)	FILED
	Jan 18 1978
Appellee,) Emil E. Melfi, Jr.
) clerk, U.S. Court
) of Appeals
v.) No. 77-1693
)
RUSSELL McNIFF,) MEMORANDUM
)
Appellant.)

Appeal from the United States District
Court for the Central District of California

Before: CHAMBERS and GOODWIN, Circuit
Judges, and SOLOMON,* District Judge.

McNiff was convicted of conspiracy and mail fraud for his part in invoicing businesses for office supplies never order or sent. He appeals. We affirm.

McNiff had been indicted for an earlier conspiracy to bill businesses for advertisements never placed or run. The jury in the first conspiracy trial acquitted McNiff but convicted

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

his alleged coconspirator, Harvey Weisenthal. The present indictment was returned after the first trial. The defendants in both cases were generally the same. By the time the second case went to trial all defendants except Weisenthal and McNiff had pleaded guilty. The jury convicted McNiff and Weisenthal. Weisenthal is a fugitive, and has presented no issues for appeal.

McNiff now argues that because both conspiracies were based on similar facts and involved most of the same people, the government's failure to join the two indictments violated his due process rights. The government asserts that the two conspiracies could not have been joined for trial, but we need not rule on this assertion. It is sufficient to note that there are no grounds for requiring joinder here. Fed.R.Crim. P. 8(a) states that two or more offenses "may be joined in the same indictment" if they are similar. The rule is permissive rather than mandatory.

Here we have no evidence that the failure to join the charges was the result of prosecutorial misconduct. A conscious prosecutorial decision to charge and try seriatim a number of crimes which could have been joined under Rule 8(a) merely to harass a defendant, or to improve the possibility of at least one conviction out of doubtful cases, or to withhold charges on one case to await the outcome of a trial on another, might raise some due-process questions. Sanchez v. United States, 341 F.2d 225, 228 (9th Cir.), cert. denied, 382 U.S. 856 (1965). But here McNiff knew before the first trial started that the second indictment was on the way. The delay was motivated by the

government's need for further evidence rather than by a conscious stratagem. There is nothing in Rule 8(a) or in common sense that requires a prosecutor to rush a case to the grand jury while evidence is still to be collected.

McNiff recognizes that he has no Sixth Amendment speedy trial claim because he was not arrested on the current charge until he had been indicted. United States v. Marion, 404 U.S. 307 (1971).

His Fifth Amendment due process claim based on pre-indictment delay fails because he has shown no prejudice other than the burdens inherent in an additional trial. McNiff may not complain of the government's use of the time to gain additional evidence, so long as his own evidence remained unimpaired; the government need not bring charges the moment it has probable cause. United States v. Mays, 549 F.2d 670, 677-78 (9th Cir. 1977).

McNiff asserts other alleged errors in the reference to Weisenthal's earlier conviction during the second trial. He claims that this evidence prejudiced him by linking him with Weisenthal's previous fraudulent activity. He was free to tell the jury about his own acquittal, had he chosen to do so.

McNiff had sought a severance from Weisenthal but failed to pursue it diligently. United States v. Kaplan, 554 F.2d 958, 966, (9th Cir. 1972). In any event, there was no abuse of discretion in trying the two conspirators together.

Moreover, the trial court carefully instructed the jury that it could consider the previous conviction of Weisenthal only on the issues of Weisenthal's state of mind and intent, and that it could not use Weisenthal's conviction against McNiff at all. This was everything to which McNiff was entitled.

Witness Berk testified that, at the beginning of the conspiracy, McNiff complained that he would be "getting less" than he had received before. This statement was relevant to McNiff's intent in entering the conspiracy, and it did not violate the court's forceful instruction to Berk not to mention McNiff's activities before the second conspiracy began. The testimony may have given the jury some cause to speculate about McNiff's previous involvement in fraudulent schemes, but a man's history is of his own making. The court's refusal to grant a mistrial because of this single statement was not erroneous.

McNiff's remaining contentions are also without merit. An article concerning an unrelated conspiracy involving persons unrelated to the present case appeared on page three of section two of a newspaper on the first day of the trial. This coincidence is not the sort of prejudicial "pretrial publicity" which the Supreme Court condemned in Sheppard v. Maxwell, 384 U.S. 333 (1966).

McNiff's attempt to question a witness Sulak about Sulak's son's involvement in the conspiracy and about Sulak's involvement in other conspiracies not involving McNiff was ruled irrelevant. This was no error. The court has considerable

discretion in controlling the scope of cross-examination and in excluding evidence that might simply lengthen the trial or confuse the issues. Fed. R. Evid. 403; United States v. Stanfield, 521 F.2d 1122, 1128 (9th Cir. 1975).

The court allowed McNiff's attorney forty minutes for closing argument instead of the hour requested. This was not a denial of the right to make a closing argument under Herring v. New York, 422 U.S. 854 (1975). The court in Herring recognized that the trial court may limit argument to a reasonable time. Counsel should be flexible enough to adjust an argument to any reasonable time the court may allow.

The prosecutor's statement to the jury, that the only difference between the defendants and the witnesses who testified for the government was that the government's witnesses were willing to admit that they were crooks, while of questionable propriety, was not so clear a comment on McNiff's failure to testify that it requires reversal. See United States v. Taitano, 442 F.2d 467, 678-69 (9th Cir.), cert. denied, 404 U.S. 852 (1971); Hayes v. United States, 368 F.2d 814, 816 (9th Cir. 1966).

The trial court instructed the jury that, in order to make a defense of withdrawal, McNiff had to perform an affirmative act to disavow or defeat the purpose of the conspiracy. McNiff objects to the instruction, but he cites no cases. The lack of cases is understandable because the instruction was correct. United States v. Cullen, 499 F.2d 545, 547 (9th Cir. 1974).

Finally, if McNiff still has a claim for personal property which he says should have been returned to him, that is a civil matter which has nothing to do with the validity of his conviction, and which presents no issues for this appeal.

Affirmed.

A-1-6

APPENDIX No. 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT FILED

Feb 24 1978

UNITED STATES OF AMERICA,) Emil E. Melfi, Jr.
) clerk, U.S. Court
Appellee,) of Appeals
)
v.) No. 77-1693
)
RUSSELL McNIFF,) ORDER
)
Appellant.)

Appeal from the United States District
Court for the Central District of California

Before: CHAMBERS and GOODWIN, Circuit
Judges, and SOLOMON*, District Judge.

The Memorandum filed January 18, 1978, in
the above-numbered case is amended as follows:

On page 4 of the printed slip memorandum,
beginning at line 7 (page 4, line 26 of typed
Memorandum), after "between the" insert
"defendants and the"; after "government" delete
"and those who testified for the defendants"; and
after "was" insert "that".

*The Honorable Gus J. Solomon, Senior United
States District Judge for the District of Oregon,
sitting by designation.

A-2-1

The attached amended pages 4 and 5 for the typewritten Memorandum, incorporating the above changes, are filed herewith.

With the Memorandum so amended, appellant's petition for rehearing filed January 30, 1978, is denied.

Appellant's motion for an order staying the issuance of the mandate in this case pending the filing, consideration, and disposition by the Supreme Court of the United States of a petition for writ of certiorari is denied.

MAY 22 1978

No. 77-1355

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

RUSSELL MCNIFF, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

JEROME M. FEIT,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

<i>Barnard v. United States</i> , 342 F. 2d 309, certiorari denied, 382 U.S. 948	10
<i>Butler v. United States</i> , 317 F. 2d 249, certiorari denied <i>sub nom. Benedec v.</i> <i>United States</i> , 375 U.S. 836	10
<i>Griffin v. California</i> , 380 U.S. 609	5-6
<i>Hamling v. United States</i> , 418 U.S. 87	7
<i>Herring v. New York</i> , 422 U.S. 853	10
<i>Knowles v. United States</i> , 224 F. 2d 168	8
<i>Lakeside v. Oregon</i> , No. 76-6942, decided March 22, 1978	6
<i>Samuels v. United States</i> , 398 F. 2d 964, certiorari denied, 393 U.S. 1021	8
<i>Taylor v. McKeithen</i> , 407 U.S. 191	11
<i>United States v. Adamo</i> , 534 F. 2d 31, certiorari denied <i>sub nom. Kearney v.</i> <i>United States</i> , 429 U.S. 841	7

	Page
Cases—(continued):	
<i>United States v. Armedo-Sarmiento</i> , 545 F. 2d 785, certiorari denied, 430 U.S. 917 .	7, 8
<i>United States v. Brown</i> , 546 F. 2d 166	8
<i>United States v. Dansker</i> , 537 F. 2d 40, certiorari denied, 429 U.S. 1038	8
<i>United States v. Dye</i> , 508 F. 2d 1226, certiorari denied, 420 U.S. 974	10
<i>United States v. Hill</i> , 500 F. 2d 733, certiorari denied, 420 U.S. 952	10
<i>United States v. Johnson</i> , 563 F. 2d 936, certiorari denied, January 9, 1978 No. 77-5765	8
<i>United States v. Kubitszky</i> , 469 F. 2d 1253, certiorari denied, 411 U.S. 908	7
<i>United States v. Mills</i> , 366 F. 2d 512	10
<i>United States v. Park</i> , 421 U.S. 658	7
<i>United States v. Ricco</i> , 549 F. 2d 264, certiorari denied <i>sub nom. Indiviglia v. United States</i> , 431 U.S. 905	7
<i>United States v. Rothman</i> , 567 F. 2d 744	8
<i>United States v. Roviato</i> , 379 F. 2d 911	10
<i>United States v. Salazar</i> , 485 F. 2d 1272, certiorari denied, 415 U.S. 985	10
<i>United States v. Taitano</i> , 442 F. 2d 467, certiorari denied, 404 U.S. 852	8
<i>United States v. Ward</i> , 552 1080, certiorari denied, October 3, 1977 No. 76-6920	8
<i>United States v. Williams</i> , 521 F. 2d 950	8

	Page
Statutes:	
18 U.S.C. 371	2
18 U.S.C. 1341	2
18 U.S.C. 1342	2

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1355

RUSSELL MCNIFF, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. No. 1) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1978. A petition for rehearing was denied on February 24, 1978 (Pet. App. No. 2), and the petition for a writ of certiorari was filed on March 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a statement made by the prosecutor in closing argument constituted an improper comment on petitioner's failure to testify.

2. Whether the district court properly exercised its discretion in limiting petitioner's counsel to 40 minutes for summation.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341, one count of using fictitious business names for the purpose of committing mail fraud, in violation of 18 U.S.C. 1342, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371.¹ He was sentenced to concurrent terms of 15 months' imprisonment on the conspiracy and fictitious name counts, and to concurrent terms of five years' probation on the mail fraud counts. The terms of probation were to run consecutively to the terms of imprisonment. The court of appeals affirmed (Pet. App. A-1-1 to A-1-6).

1. The charges against petitioner stemmed from his involvement in a scheme to defraud various commercial and non-profit organizations by billing those organizations for office supplies that had never been ordered and that were never delivered. Among the witnesses who testified for the government were three co-defendants, Irving J. Field, Leonard J. Berk and Paul Sulak, each of whom had previously pleaded guilty and was awaiting sentence at the time of trial (Pet. 5). Neither petitioner nor co-defendant Harvey Weisenthal testified for the defense.

The evidence showed that in August 1974 co-defendant Weisenthal proposed to petitioner and co-defendants Field and Berk that they engage in the fraudulent billing

¹Co-defendant Harvey Weisenthal was convicted of ten counts of mail fraud, one count of using fictitious business names and one count of conspiracy (Tr. 907-908).

of business accounts for office supplies that had not been ordered or delivered (Tr. 221-222, 226, 465-467). Co-defendant Field, who was in the office supply business, provided Weisenthal with the names of firms that had paid for supplies shipped to them on previous occasions (Tr. 222, 233, 467-468). Weisenthal then tested the scheme by placing telephone calls to two of Field's prior accounts. He stated that his business had had a computer breakdown, that as a result he had not yet mailed out invoices billing the accounts for office supplies that had previously been sent, but that a duplicate invoice would be forwarded shortly (Tr. 232).

After completing the calls, Weisenthal expressed confidence that the scheme would be successful (Tr. 232). As manager of the operation, petitioner was to handle all the bank accounts and incoming funds. In return, he was to receive ten percent of the gross receipts. Co-defendants Weisenthal and Field were to split the balance after deducting payments made to "salesmen" who were to contact the victimized accounts (Tr. 235, 238). The participants agreed that the operation would use the trade name All American Office Supply (Tr. 236).

On August 28, 1974, petitioner opened a bank account under the name All American Office Supply Company (Gov't Exh. 8). The following day, he filed a registration statement under that business name with the County Clerk of Los Angeles County (Gov't Exh. 1). Petitioner also opened an account under the same name at a mail receiving service, where he subsequently picked up mail addressed to the fictitious company (Tr. 387-391).² In

²Later, petitioner opened bank accounts and filed registration statements under the names Consolidated Office Supply and International Office Supplies (Gov't Exhs. 2, 3, 10, 12). He also

addition, both petitioner and Weisenthal purchased copies of office supply invoices from Douglas Giddings in 1975 (Tr. 578-585).³ The invoices provided the names of new "customers" who were then billed for office supplies never ordered or shipped.

In August 1974, Joe Reid, an attorney in San Antonio, Texas, received in the mail two documents purporting to be duplicate invoices from All American Office Supply Company for office materials never ordered or received (Tr. 288-290; Gov't Exhs. 24(a), (b), and (c)). Likewise, David Saturley, a data processor for Thomas Industries of Hopkinsville, Kentucky, received in the mail two purported duplicate invoices from All American Office Supply for items never ordered or received (Tr. 319-321, Gov't Exhs. 25(a), (b), (c), and (d)). The invoices received by Reid and Saturley formed the basis of the two mail fraud counts on which petitioner was convicted.

2. In closing arguments, defense counsel strongly attacked the credibility of the three co-defendants who had testified for the government (Tr. 790, 793, 795, 798, 803, 805, 808). These witnesses were characterized by the defense as "admitted liars" (Tr. 798) who hoped to receive lenient sentences in return for their testimony and who thus had "every motive to attempt to minimize their participation and to thrust the blame off on somebody else" (Tr. 790-791).

opened accounts under these names at different mail receiving services (Tr. 392-398, 312-316). Co-defendant Sulak, who was employed as a salesman for Consolidated Office Supply, was paid for his services by petitioner (Tr. 626-630).

³Giddings admitted that in October 1975 he burglarized the premises of a legitimate office supply company and stole invoices that he then sold to petitioner (Tr. 585-587).

In rebuttal, the prosecutor remarked that petitioner and co-defendant Weisenthal, not the government, had selected the co-defendant witnesses by enlisting their services in the fraudulent scheme. The prosecutor added (Tr. 822):

But I would submit to you, ladies and gentlemen, that their testimony, regardless of what you think of them personally, is very believable. I would also say once again that their testimony was corroborated by every other bit of evidence in this case, every mail drop person, every document, every bank account, every victim.

There wasn't one thing they said which was inconsistent with any other bit of evidence in this case.

No question Mr. Giddings is a crook. Mr. Berk, Mr. Field, Mr. Sulak, they are all crooks. They told you that. I am telling you that. The only difference between those people and these two gentlemen is that they are willing to admit they are crooks.⁴

Petitioner and co-defendant Weisenthal objected to this last sentence and moved for a mistrial on the ground that it constituted an improper comment on the defendants' failure to testify, in alleged violation of *Griffin v. California*, 380 U.S. 609 (Tr. 832). After denying the motion

⁴In his initial summation, the prosecutor made similar arguments in anticipation of defense counsel's challenges to the credibility of the co-defendant witnesses. The prosecutor observed that most of the government's evidence consisted of documents signed by petitioner or testimony from disinterested witnesses, including the mail receiving service employees and the addressees of the bogus invoices (Tr. 768-770). Furthermore, the prosecutor stressed that the co-defendants who testified had "freely admitted their own guilt" and had explained their own roles as well as those of petitioner and co-defendant Weisenthal (Tr. 773).

(Tr. 837-839), the district court carefully emphasized to the jury that the defendants were presumed innocent and were under no obligation to testify or produced evidence. The Court further instructed the jury that no unfavorable inference could be drawn from defendants' failure to testify or produce evidence (Tr. 841, 843, 844-845, 850, 851, 879).⁵

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the prosecutor's statement in summation constituted an improper, albeit indirect, comment on petitioner's failure to testify that requires reversal of his conviction under *Griffin v. California, supra*. In *Griffin*, however, the jury was expressly encouraged by the prosecutor to draw adverse inferences from the defendant's failure personally to respond to the testimony against him. Moreover, the prejudicial impact of the prosecutor's comment in *Griffin* was reinforced by the trial judge's instructions that the jury could consider the defendant's failure to explain the evidence against him as indicative of the truth of that evidence. The circumstances of the present case do not remotely resemble those of *Griffin*.⁶

⁵In addition, in the course of their summations, both defense counsel told the jury that no inference could be drawn from the defendants' failure to take the stand (Tr. 796-797, 817).

⁶Earlier this Term, this Court held that no constitutional privilege is infringed when a trial judge instructs the jury, over defendant's objection, that no adverse inference may be drawn from defendant's failure to testify. *Lakeside v. Oregon*, No. 76-6942, decided March 22, 1978. In the course of its opinion, the Court referred to its earlier holding in *Griffin* (slip op. 4, 5-6):

In setting aside the judgment of conviction, the Court [there] held that the Constitution "forbids either comment by the

The prosecutor did not request the jury to draw any inference from petitioner's failure to testify. Viewed in context (see *United States v. Park*, 421 U.S. 658, 674-675; *Hamling v. United States*, 418 U.S. 87, 102), the prosecutor's statement was made in direct response to the defense attack upon the credibility of the three co-defendant witnesses. While perhaps inartfully phrased, the statement was intended to convey—and did convey—the message that, although the accomplice witnesses admittedly were "crooks," their testimony concerning the involvement of petitioner and Weisenthal in the scheme was worthy of belief because the witnesses had demonstrated considerable candor in testifying about their own complicity in the criminal venture and because their testimony was consistent with the other evidence in the case. In short, the prosecutor sought not to penalize petitioner for his silence but merely to bolster the credibility of several unsavory government witnesses whom the defense had branded as liars. See *United States v. Arredo-Sarmiento*, 545 F. 2d 785, 793-794 (C.A. 2), certiorari denied, 430 U.S. 917. See also *United States v. Ricco*, 549 F. 2d 264, 274 (C.A. 2), certiorari denied *sub nom. Indiviglia v. United States*, 431 U.S. 905; *United States v. Adamo*, 534 F. 2d 31, 40 (C.A. 3), certiorari denied *sub nom. Kearney v. United States*, 429 U.S. 841; *United States v. Kubitszky*, 469 F. 2d 1253, 1255 (C.A. 1), certiorari denied, 411 U.S. 908.

prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." * * *

* * * * *

It is clear from even a cursory review of the facts and the square holding of the *Griffin* case that the Court was there concerned only with *adverse* comment, whether by the prosecutor or the trial judge * * *.

The courts of appeals, including the Ninth Circuit, have generally agreed that the test to be applied in assessing a claim like that advanced here is whether "the prosecutor's manifest intention was to comment upon the accused's failure to testify [or whether the challenged statement] was * * * of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Samuels v. United States*, 398 F. 2d 964, 968 (C.A. 5), certiorari denied, 393 U.S. 1021, quoted with approval in *United States v. Ward*, 552 F. 2d 1080, 1083 (C.A. 5), certiorari denied, October 3, 1977 No. 76-6920. See also *United States v. Rothman*, 567 F. 2d 744, 751 (C.A. 7); *United States v. Johnson*, 563 F. 2d 936, 942 (C.A. 8), certiorari denied, January 9, 1978 No. 77-5765; *United States v. Armento-Sarmiento*, *supra*; *United States v. Dansker*, 537 F. 2d 40, 63 (C.A. 3), certiorari denied, 429 U.S. 1038; *United States v. Williams*, 521 F. 2d 950, 953 (C.A.D.C.); *United States v. Taitano*, 442 F. 2d 467, 468 (C.A. 9), certiorari denied, 404 U.S. 852; *Knowles v. United States*, 224 F. 2d 168, 170 (C.A. 10). Application of this standard to the circumstances of the present case reveals no impropriety in the prosecutor's remark. Moreover, any possible error was rendered harmless by the district court's prompt and thorough curative admonitions that the defendants bore no burden of proof and that no inferences could be drawn from their failure to testify. See, e.g., *United States v. Johnson*, *supra*, 563 F. 2d at 942; *United States v. Brown*, 546 F. 2d 166, 173-174 (C.A. 5); *United States v. Taitano*, *supra*, 442 F. 2d at 469.⁷

⁷One of the questions presented in *Lockett v. Ohio*, No. 76-6997, argued January 17, 1978, is whether the prosecutor's statement that the evidence against the defendant was uncontradicted and unrefuted constituted an impermissible comment on the defendant's failure to testify. The statement at issue here, viewed in context, was not an

2. Petitioner also contends (Pet. 17-20) that the district court erred in limiting his attorney to 40 minutes for closing argument instead of granting the full hour that defense counsel requested.⁸ As the court of appeals properly held (Pet. App. A-1-5), however, the district court acted well within its discretion in limiting the length of the summations in this case.

After both sides had rested, the district court inquired of all counsel concerning the expected duration of their closing arguments. Petitioner's attorney initially stated that he would need 10 to 15 minutes more than the prosecutor, or perhaps half an hour in all (Tr. 744-745). After the prosecutor advised the court that his initial summation would require half an hour (and counsel for co-defendant Weisenthal indicated that his argument would take 20 to 30 minutes at most) (Tr. 745),

adverse comment on petitioner's failure to testify and is substantially less susceptible to that interpretation than the challenged remarks in *Lockett*. Petitioner complains that the prosecutor called to the jury's attention the defendants' unwillingness "to admit they are crooks." But, even if petitioner and his co-defendant *had* testified, they surely would have made no such admission. Under these circumstances, the jury could not have interpreted the prosecutor's statement as an invitation to draw adverse inferences from petitioner's failure to testify. Accordingly, disposition of the instant petition need not await the decision in *Lockett*.

⁸Petitioner also asserts (Pet. 4, 18) that the district court erred in telling the jury that it was the court's custom to permit the court reporter to read testimony to the jury during its deliberations only in exceptional cases. The record does not show whether the court's statement was directed toward petitioner's counsel or to the jury; in any event, the court later stated to counsel that, while there was no absolute right to have testimony read, if the jury were to request repetition of certain testimony, the court would carefully consider such a request at that time (Tr. 839-840). The jury, however, never made any such request.

petitioner's attorney asked for a full hour "just to be on the safe side" (Tr. 746). Counsel then stated that he needed an hour "to adequately cover the case"; the court granted him 40 minutes (Tr. 747).

In *Herring v. New York*, 422 U.S. 853, 862, this Court expressly recognized that the trial judge enjoys "great latitude" in controlling the duration of closing arguments. The courts of appeals have consistently accorded considerable deference to the sound discretion exercised by trial judges in imposing reasonable time limits for summations. See, e.g., *United States v. Dye*, 508 F. 2d 1226, 1231 (C.A. 6), certiorari denied, 420 U.S. 974 (total of one hour and 40 minutes allotted to 11 defendants); *United States v. Hill*, 500 F. 2d 733, 739 (C.A. 5), certiorari denied, 420 U.S. 952 (20 minutes); *United States v. Salazar*, 485 F. 2d 1272, 1279 (C.A. 2), certiorari denied, 415 U.S. 985 (45 minutes); *United States v. Roviato*, 379 F. 2d 911, 914-915 (C.A. 7) (30 minutes); *United States v. Mills*, 366 F. 2d 512, 515 (C.A. 6) (35 minutes); *Barnard v. United States*, 342 F. 2d 309, 321 (C.A. 9), certiorari denied, 382 U.S. 948 (30 minutes); *Butler v. United States*, 317 F. 2d 249, 256-257 (C.A. 8), certiorari denied *sub nom. Benedec v. United States*, 375 U.S. 836 (total of three full court days allotted to 36 individual defendants and one corporate defendant).

Here, the 40 minutes that the district court allotted to petitioner's counsel were more than sufficient for counsel to address the issues and the evidence in the case. Counsel for petitioner received more than the half hour he originally sought, and his argument was nearly twice as long as that for co-defendant Weisenthal. Moreover, since petitioner conceded that his signatures appeared on certain business registration statements and bank accounts that were used to further the fraudulent scheme (Tr. 801), the only defense available to him—and the only

one he pursued—was that he had been duped into signing these documents and therefore lacked the requisite criminal intent. More particularly, he argued that he did not know that the documents would be used in connection with an illegal venture, and he further claimed that the government's accomplice witnesses tried to establish his involvement "to save their own necks" (Tr. 803). This defense was relatively simple to convey to the jury and did not require extensive elaboration. Finally, petitioner's counsel was permitted to complete his argument without being interrupted by the court (Tr. 820).⁹

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

JEROME M. FEIT,
ELLIOTT SCHULDER,
Attorneys.

MAY 1978.

⁹Petitioner's additional contention (Pet. 15-16) that the court of appeals' opinion does not satisfactorily articulate the grounds for affirmance is frivolous. The courts of appeals may exercise broad discretion in deciding whether or how to write opinions (see *Taylor v. McKeithen*, 407 U.S. 191, 194 n. 4), and such internal matters of judicial administration should not be open to review merely because a litigant is dissatisfied with the outcome of his appeal.